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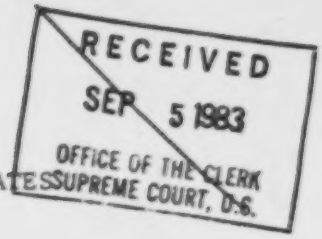
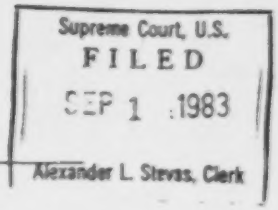


IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982



ANTONIO JAMES,
Petitioner

VERSUS

STATE OF LOUISIANA,
Respondent

83-5366

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

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August 31, 1983

QUESTIONS PRESENTED FOR REVIEW

I. Whether the denial of the right to rehabilitate a prospective juror only arguably subject to a Witherspoon challenge for cause denied the defendant his Sixth Amendment right to an impartial jury and his Fourteenth Amendment rights to due process and equal protection.

II. Whether a sentence of death is unconstitutionally arbitrary when the record does not support each of the aggravating circumstances returned by the jury.

III. Whether the Louisiana Supreme Court erred in failing to conduct a proportionality review on a statewide basis.

INDEX

Questions Presented for Review ---------- 1

Statement of Jurisdiction ---------- 1

Constitutional and Statutory Provisions Invoked ----- 2

Statement of the Case ---------- 2

Argument

I. The petitioner was denied his right to an impartial jury and his due process and equal protection rights when the trial court dismissed a prospective juror on Witherspoon grounds without affording petitioner a chance to rehabilitate the juror. ---------- 3

II. A sentence of death is unconstitutionally arbitrary when the record does not support each of the aggravating circumstances found by the jury. ---------- 8

III. The Louisiana Supreme Court review of the proportionality of death sentences is deficient in that it does not compare death sentences handed down across the state. ---------- 11

Certificate of Service ---------- 13

Certificate of Mailing ---------- 13

Appendix A (Constitutional and Statutory Provisions) - 14

Appendix B (State v. James, 431 So.2d 399 (La. 1983) 16

Appendix C (Order Extending Time to file for Cert.) - 29

Appendix D (Setting of September 15, 1983, Execution) 30

Appendix E (Application for Stay of Execution) ----- 31

Appendix F (Denial of Stay of Execution) ---------- 32

INDEX OF AUTHORITY

Adams v. Texas, 448 U.S. 38 (1980) ---------- 6

Aldridge v. United States, 283 U.S. 308 (1931) --------- 4

Barclay v. Florida, ___ U.S. ___ (1983) ---------- 11

Boulden v. Holman, 394 U.S. 478 (1969) ---------- 6

Davis v. Georgia, 429 U.S. 122 (1976) ---------- 6

Godfrey v. Georgia, 446 U.S. 420 (1980) ---------- 10

Goss v. Lopez, 419 U.S. 656 (1975) ---------- 6

Gregg v. Georgia, 428 U.S. 167 (1976) ---------- 11

Maxwell v. Bishop, 398 U.S. 262 (1970) ---------- 5

Proffitt v. Florida, 428 U.S. 242 (1976) ---------- 11

Pulley v. Harris, ___ U.S. ___ (1983) ---------- 11

Witherspoon v. Illinois, 391 U.S. 510 (1968) ---------- 3, 4, 5

Zant v. Stephens, ___ U.S. ___ (1983) ---------- 8, 10, 11

Burns v. Estelle, 592 F.2d 1297 (1979), adhered to on rehearing, 626 F.2d 396 (5 Cir. 1980) ---------- 6, 7

Hance v. Zant, 696 F.2d 940 (11 Cir. 1983) ---------- 7

Moore v. Estelle, 670 F.2d 56 (5 Cir. 1982), cert. den. ___ U.S. ___ (1982) ---------- 7

State v. Chapman, 410 So.2d 689 (La. 1982) ---------- 6

State v. Claiborne, 397 So.2d 486 (La. 1981) ---------- 6

State v. James, 431 So.2d 399 (La. 1983) ---------- 1, 3, 6, 12

State v. Jordan, Nos. 83-KD-1393, 1394 ---------- 10

State v. Sawyer, 422 So.2d 95 (La. 1982) ---------- 10

State v. Shelton, 377 So.2d 96 (La. 1979) ---------- 4

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANTONIO JAMES,
Petitioner

VERSUS

STATE OF LOUISIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

The petitioner, Antonio James, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Louisiana entered in this proceeding on April 4, 1983.

OPINION BELOW

The opinion of the Louisiana Supreme Court in State v. James, 431 So.2d 399 (La. 1983) appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on April 4, 1983. A timely petition for rehearing was denied on June 3, 1983. On August 4, 1983, in No. A-65, attached in the appendix, the Honorable Byron R. White granted an extension of time for the filing of this petition to and including September 1, 1983. This petition is therefore timely and the Court's jurisdiction appropriately invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case involves the Sixth Amendment, Fourteenth Amendment, Louisiana Revised Statute 14:30 (1976). Louisiana Code of Criminal Procedure Articles 786, 798(2), 799, 800, 905.4, Louisiana Supreme Court Rule 28, and the Louisiana Constitution of 1974, Article I, § 17. The full text of each is included in the appendix.

STATEMENT OF THE CASE

An Orleans Parish grand jury indicted Antonio James for the January 1, 1979, first degree murder of Henry Silver. In mid-December of 1981, the case came to trial. In a three-day trial the defendant was found guilty as charged; at the sentencing phase the jury returned with a binding recommendation of death.

Testimony at trial tended to establish that on the date in question the defendant was driving around New Orleans with a friend. At some point, the defendant asked to be let out, and allegedly walked several blocks, approaching the victim and demanding his money. When the victim cried out for help, the defendant shot him once, mortally wounding him. The defendant then rifled through the victim's pockets, taking a wallet containing thirty-five dollars in cash.

In recommending the death penalty, the jury found two aggravating circumstances to be present: (1) that the defendant was engaged in the perpetration of an armed robbery at the time of the homicide (La. C.Cr.P. art. 905.4(a)); and (2) that the defendant had been previously convicted of an unrelated murder and had a significant prior history of criminal activity. On appeal to the Louisiana Supreme Court petitioner attacked the reliability of the death sentence, claiming that there was insufficient evidence to support the return of the second aggravating circumstance. The Louisiana Supreme Court brushed this claim aside, taking the position

that where more than one statutory aggravating

> circumstance is found by the jury, the failure of one aggravating circumstance does not invalidate any other aggravating circumstance found and the sentence of death based thereon.

431 So.2d at 405. The Louisiana Supreme Court also dismissed the claim that the death sentence was invalid because the petitioner had not been allowed to rehabilitate a potential juror only arguably subject to a Witherspoon (Witherspoon v. Illinois, 391 U.S. 510 (1968)) challenge, noting that the prosecution did not exhaust its peremptory challenges and could have used that peremptory challenge to remove the venireman from the jury even had the challenge for cause proved groundless. Finally, the Louisiana Supreme Court compared petitioner's sentence with the sentences imposed in other first degree murders withing the same judicial district (in this case, Orleans Parish), and finding it not disproportionate, affirmed both the conviction and sentence.

ARGUMENT

I.

THE PETITIONER WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY AND HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS WHEN THE TRIAL JUDGE DISMISSED A PROSPECTIVE JUROR ON WITHERSPOON GROUNDS WITHOUT AFFORDING PETITIONER A CHANCE TO REHABILITATE THE JUROR.

The right to an impartial jury is secured for every criminal defendant in Louisiana, not just by the Sixth Amendment to the United States Constitution, but also by the Louisiana Constitution of 1974, in Article I, §17. The latter section provides in part that the

> accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily.

As a result of this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), the Louisiana Legislature enacted La. C.Cr.P. art. 798, which allows the state to challenge for cause in a capital case any juror who has scruples against the infliction of capital punishment and makes it clear, inter alia, "that he would automatically vote against the imposition of capital punish-

ment without regard to any evidence which might be developed at the trial of the case before him."

Other than challenges for cause, Louisiana allows the exercise by both the state and defense of twelve peremptory challenges in a capital case. La. C.Cr.P. art. 799. Unlike the federal system which grants no absolute right to voir dire by the defense, the Louisiana scheme allows for far-ranging questions by the court, the state, and the defendant. La. Const. of 1974, Art. I, § 17; La. C.Cr.P. art. 786; State v. Claiborne, 397 So.2d 486 (La. 1981). While a judge may exercise his discretion in ending repetitive or irrelevant voir dire, that discretion is tempered by the essential demands of fairness. Aldridge v. United States, 283 U.S. 308 (1931). Under the Louisiana jurisprudence, that essential fairness has always included the defense's right to rehabilitate a prospective juror whom the state has challenged for cause. State v. Claiborne, supra; State v. Shelton, 377 So.2d 96 (La. 1979). In both Claiborne and Shelton the Louisiana Supreme Court presumed that had defense counsel been allowed to question the prospective juror, his impartiality could have been demonstrated, and for this reason reversed both convictions.

The argument in the case at bar revolves around the examination of prospective juror Narcisse, which transpired as follows:

> BY MR. JOHNSON [defense counsel]: Mr. Hitts, the statutory fact that you would only consider the death penalty after the jury reached a unanimous verdict of guilty as charged, would that in your mind have any persuasive effect as to your ability to--then and only then at that time would you consider a death penalty, which is a remote possibility.
> BY PROSPECTIVE JUROR HITTS: I couldn't accept it at all.
> BY MR. JOHNSON: There's no circumstances under which you could consider it?
> BY PROSPECTIVE JUROR HITTS: I couldn't accept the death penalty at all.
> BY MR. PADDISON: Reurge my challenge.
> BY THE COURT: Challenge for cause. You're excused, sir.
> BY MR. PADDISON: Ms. Narcisse, you're shaking your head. You've got the same problem?
> BY PROSPECTIVE JUROR NARCISSE: Same problem.
> BY MR. PADDISON: I have to ask you these questions. Bear with me. I'm not trying to pry. Regardless of what the statute says basically because of this feeling you couldn't apply the law?

BY PROSPECTIVE JUROR NARCISSE: No.
BY MR. PADDISON: Has it been a longstanding personal scruple on your part?
BY PROSPECTIVE JUROR NARCISSE: I just don't believe in it.
BY MR. PADDISON: And you've had it a long time?
BY PROSPECTIVE JUROR NARCISSE: Long enough. I just don't believe in it.
BY MR. PADDISON: All right. Are there any circumstances you could envision, regardless of whether or not it fit the statute, regardless of whether or not our legislature says that you should do it under these circumstances, is there any circumstance you could consider recommending the death penalty?
BY PROSPECTIVE JUROR NARCISSE: I just don't believe in it.
BY MR. PADDISON: Thank you very much, Ms. Narcisse. Challenge for cause.
BY MR. JOHNSON: Ms. Narcisse, again, if you would only consider the fact that this is a possibility and a remote one at that--
BY MR. PADDISON: Object to his characterization of anything being remote in this case.
BY MR. JOHNSON: Your Honor, I've asked that question a number of times before.
BY MR. PADDISON: Well, I'm objecting.
BY THE COURT: Finish your question.
BY MR. JOHNSON: Considering the fact, Ms. Narcisse, that this is one of an alternative number of verdicts and a case where it would only occur after you reached a verdict unanimously with eleven other jurors for a guilty as charged verdict. And then and only then would you consider that particular sentencing verdict as an alternative. Would that in your mind because of the remoteness of that possibility change your ability to consider this --
BY MR. PADDISON: I reurge my objection.
BY THE COURT: I'll excuse her for cause.

No one even gave defense counsel an opportunity to ask other questions, regardless of whether the question then posed was objectionable or not. In this posture, the case was strikingly similar to Maxwell v. Bishop, 398 U.S. 262 (1970). In Maxwell this Court noted that a sentence of death could not constitutionally stand where a member of the jury panel was dismissed after the following exchange:

> Q. Mr. Adams, do you have any feeling concerning capital punsihment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?
> A. No, I don't believe in capital punishment.

398 U.S. at 265. As in Maxwell, the prosecutor in the case at questioned the prospective juror Narcisse as to her "feelings",

and as in Maxwell the potential juror answered that she did not "believe" in capital punishment. This falls far short of an unambiguous statement that she would automatically vote against capital punishment no matter what the trial might reveal. Witherspoon v. Illinois, supra, at 516 n. 9. At the very least, the answers given by Ms. Narcisse deserved further exploration.[1]

However, it appears that Louisiana first gave the right to rehabilitate a prospective juror, both by constitutional grant and by statute (see Goss v. Lopez, 419 U.S. 565, 573 (1975) on the basis of a claim of liberty or property interest), but then took it away. Under the Louisiana jurisprudence, defense counsel had clearly tried to exercise his right to rehabilitate the juror, but had been cut off. As such, it appeared that there was no procedural bar to the raising of this issue on appeal. Compare State v. Chapman, 410 So.2d 689, 695-96 (La. 1982). However, on appeal, the Louisiana Supreme Court adverted to La. C.Cr.P. art. 800, which provides that a defendant cannot complain of the erroneous granting of a challenge for cause unless it appears that the effect of the erroneous grant was to allow the state more peremptory challenges than it would have been entitled to under the law. In this capital case, the state was allowed twelve peremptory challenges, but exercised only eleven. The Louisiana Supreme Court therefore presumed that the twelfth peremptory challenge would have been exercised against Ms. Narcisse had the trial judge denied the challenge for cause, either with or without rehabilitation. State v. James, 431 So.2d 399, 403 (La. 1983).

It is settled that the exclusion of even one venireman on grounds broader than Witherspoon preclude the imposition of the death penalty. Adams v. Texas, 448 U.S. 38 (1980); Davis v. Georgia, 429 U.S. 122 (1976); Maxwell, supra; Boulden v. Holman, 394 U.S. 478 (1969). In Davis, thre was no suggestion that

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1. Compare Burns v. Estelle, 592 F.2d 1297 (5 Cir. 1979), for a similar case in which the juror's answers needed further exploration. Like the Louisiana Supreme Court's rule in previous cases, the Fifth Circuit panel in Burns presumed that with rehabilitation the prospective jurors would have been acceptable.

that the defendant could not complain of the erroneous grant of a Witherspoon challenge unless he first showed that the state had exhausted its peremptory challenges. Indeed, the legislative presumption in La. C.Cr.P. art. 800 that the state would have exercised its available peremptory challenge against the prospective juror Ms. Narcisse and that the defendant was therefore not prejudiced is unfounded. Not only can the Louisiana legislature not know which prospective juror the prosecution would have challenged, but the inquiry should not focus on the particular juror, but upon the composition of the panel as a whole. As a prosecutor exhausts his supply of peremptory challenges, he becomes tempted to leave on the panel veniremen whom he might have excused had he still had all peremptory challenges left, for fear that the remainder of the panel is even more unfavorable than that part presently seated in the jury box. The composition of the jury as a whole is affected.[2]

In the case at bar, then, it is clear that the defense should have been allowed to rehabilitate this juror. In light of Maxwell, it is possible that the defense should not have had to attempt any rehabilitation, that the challenge for cause was not properly founded under Witherspoon. The denial of an attempt to rehabilitate is presumptively prejudicial under Louisiana jurisprudence, however by Article 800 the state has attempted to distinguish between those defendants in whose trials the state has exhausted its peremptories, and those defendants in whose trials the state has not exhausted its peremptories. Such a distinction is without a rational basis, and therefore violates the equal protection clause of the Fourteenth Amendment.

Based therefore upon the claim that the prospective juror was improperly dismissed, that the denial of an opportunity to rehabilitate her denied him fundamental due process, and that

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2. This rationale has been used extensively in the Circuit Courts to grant reversals. See Burns v. Estelle, 592 F.2d 1297 (5 Cir. 1979), adhered to on reh. 626 F.2d 396 (5 Cir. 1980); Moore v. Estelle, 670 F.2d 56 (5 Cir. 1982), cert. den. ___ U.S. ___ (1982); Hance v. Zant, 696 F.2d 940 (11 Cir. 1983).

defendants based on the exhaustion or non-exhaustion of peremptories by the state, petitioner requests that this Court grant certiorari and vacate the conviction and sentence in this case.

II.

A SENTENCE OF DEATH IS UNCONSTITUTIONALLY ARBITRARY WHEN THE RECORD DOES NOT SUPPORT EACH OF THE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY.

In the case at bar, this claim of error requires a two part inquiry: (1) whether there was an erroneous finding of an aggravating circumstance, and (2) if so, should this case be governed by the rule enunciated by this Court in Zant v. Stephens, ___ U.S. ____ (1983, No. 81-89). This Court's task is compounded by the Louisiana Supreme Court's refusal to consider the constitutionality of La. C.Cr.P. art. 905.4(c) per se and as applied in this case, a refusal based on the Louisiana Supreme Court's understanding that its role is limited to searching the record for evidence to support only one of the aggravating circumstances returned by the jury. State v. James, supra at 405.

At the time of the alleged offense, La. R.S. 14:30 (1976) provided that first degree murder was the specific intent killing of any human being. Following a verdict of guilty as charged, the jury was to decide whether any of a specific list of aggravating circumstances was present, and then considering both aggravating and mitigating circumstances, make a binding recommendation of either life or death. At the time of the alleged offense, i.e. on January 1, 1979, La. C.Cr.P. art. 905.4(c) listed as one of those aggravating circumstances a finding that

> the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping.

Act 74 of 1979 amended La. C.Cr.P. art. 905.4(c) to allow imposition of the death penalty whenever the jury found beyond a reasonable doubt that

> the offender was previously convicted of an unrelated murder, aggravated rape, or aggra-

history of criminal activity.

(emphasis added.) At the sentencing phase of the trial the state introduced evidence to show that the defendant had been convicted in 1973 of an attepted armed robbery, and convicted of attempted simple escape while serving that sentence. The state also showed that since the commission of the offense for which he was then on trial, the defendant had committed and been convicted of another armed robbery and another murder. At trial, the district court judge read to the jury not the aggravating circumstance as it read at the time of the alleged offense, but as it had been amended since the alleged offense. The jury returned with a recommendation of death and a finding that the defendant previously had been convicted of an unrelated murder and had a significant prior history of criminal activity. [The jury also found as an aggravating circumstance La. C.Cr.P. art. 905.4(a), that the petitioner had been involved in the perpetration of an armed robbery at the time of the homicide.] On appeal, petitioner argued as he does here, that there was no evidence that he had been convicted of an unrelated murder prior to the one for which he was then on trial, and alternatively, that the statute was unconstitutionally vague. Petitioner contended that the ambiguity in the statute was created by the words "previously" and "prior", neither of which specified whether the crimes or convictions were to have occurred prior to the crime for which the accused is on trial, or only prior to the sentencing hearing itself. Petitioner argued that a common-sense reading of the statute would give effect to each word, and as every conviction is of necessity prior to the sentencing hearing (as the sentencing hearing is the present insofar as the jury's consideration of the record is concerned), the Louisiana legislature must have intended that the criminal convictions have arisen prior to the crime for which the defendant was on trial. [Such a construction would in this case result in the failure of the aggravating circumstance.] Petitioner also argued before the Louisiana Supreme Court tha the aggravating circumstance was unconsti-

tutionally vague as it gave no guidance to a jry as to what might constitute a "significant prior history of criminal activity", nor whether the elements might include arrests as well as convictions, juvenile adjudications as well as convictions, mere accusations as well as convictions, etc. [A related vagueness problem, especially as to the standards to guide the jury, was confronted by this Court in Godfrey v. Georgia, 446 U.S. 420 (1980).]

These questions of course should ultimately be confronted by the state courts before the federal courts pass on them. The Louisiana Supreme Court will hear arguments on September 9, 1983, on the constitutionality of La. C.Cr.P. art. 905.4(c) and the constitutionality of using the amended art. 905.4(c) in trials involving crimes which occurred prior to the amendment. State v. Don Jordan, Nos. 83-KD-1393 and 83-KD-1394. The grant of these writs by the Louisiana Supreme Court indicates a willingness to reevaluate the postition it took in State v. Sawyer, 422 So.2d 95 (La. 1982), cert. granted, remanded in light of Zant v. Stephens, ___ U.S. ___ (1983).

This is of course not just a discourse on the state of Louisiana jurisprudence, but rather an introduction to what petitioner sees as a significant difference between his case and Zant v. Stephens. In Zant, presently pending a decision on the application for rehearing, evidence had been introduced to show the existence of a Georgia aggravating circumstance almost identical to the one at bar. Subsequent to the jury's return of this aggravating circumstance and its recommendation that the defendant in Zant be put to death, the Georgia Supreme Court found the aggravating circumstance unconstitutionally vague. Origianlly presented with the question of whether the failure of one aggravating circumstance mandated vacating the death sentence, this Court asked the Georgia Supreme Court for its premises of state law supporting the conclusion it had reached. The Georgia Supreme Court responded that the finding of an aggravating circumstance, under Georgia law, merely made a defendant eligible for the death

penalty, and that the jury then considers all evidence in deciding on the penalty to be imposed in that particular case.

Essential to the decision in Zant, however, was the recognition that even had the aggravating circumstance not been on the jury's list, the state could still have introduced evidence of the defendant's previosu convictions. The Georgia Surpeme Court noted and the STate of Georgia in argument conceded that the case would bear a different aspect had inadmissible evidence been placed before the jury. Zant v. Stephens, 33 Cr.L. at 3198, 3202 fn. 24; cf. Barclay v. Florida, ___ U.S. ___ (1983). In the case at bar, Louisiana has not yet considered whether the evidence would be inadmissible if the aggravating circumstance were unconstitutional, or if the aggravating circumstance were pared to render it constitutional. For this reason, petitioner submits that this Court cannot consider his case analogous to Zant until the Louisiana Supreme Court clears up its own rules of evidence in the forthcoming Jordan opinion. Failing that, petitoner would ask this Court to consider holding La. C.Cr.P. art. 905.4(c) void for vagueness.

III.

THE LOUISIANA SUPREME COURT REVIEW OF THE PROPORTIONALITY OF DEATH SETNENCES IS DEFICIENT IN THAT IT DOES NOT COMPARE DEATH SENTENCES HANDED DOWN ACROSS THE STATE.

In Pulley v. Harris, ___ U.S. ___ (1983), this Court granted certiorari to consider whether the constitutionality of the death penalty rests in part upon the performance of a proportionality review by a court of statewide jurisdiction, and the standards for such a review if one is needed. While petitioner did not present a similar question to teh Louisiana Supreme Court, he urges this Court to address the issue with respect to Louisiana.

The emphasis in the line of cases beginning with Gregg v. Georgia, 428 U.S. 153 (1976) was upon procedural due process, and in Gregg itself the Court underscored the stabilizing effect that a comprehensive review by the Georgia Supreme Court would have. Gregg, 428 U.S. at 167, 203; cf. Proffitt v. Florida,

428 U.S. 242, 259 (1976). In Louisiana, though the review is conducted by a court with statewide jurisdiction, the Louisiana Supreme Court itself vacillates widely from comparing cases originating in several judicial districts, to comparing cases arising only in the same judicial district. In one notable instance, the Louisiana Supreme Court found a death penalty proportionate because it was the only death penalty imposed within that judicial district, and being sui generis, could not be disproportionate. Only a list of those first-degree murder prosecutions which originated in the same judicial district is submitted to the Supreme Court of Louisiana. See Louisiana Supreme Court Rule 28, §4. In the case at bar, only the death sentences from within the same judicial district were reviewed. State v. James, 431 So.2d 399, 407 (La. 1983).

The Louisiana review is most often limited to noting that the death penalty was also imposed in other cases involving armed robbery (hardly surprising as since June, 1979, this is one of only four situations in which the death penalty can be imposed), and that the offense was committed without provocation (again hardly surprising, as sufficient provocation would normally reduce the offense to manslaughter). As Louisiana provides only a superficial review of proportionality and most often limits itself to cases arising in the same judicial district, it is submitted that the Court should either grant certiorari in this case and consolidate it with Pulley v. Harris, or stay the case pending a decision in Pulley.

CONCLUSION

For the reasons set forth above, petitioner prays that this Court grant a writ of certiorari and set the case for argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for a writ of certiorari has been served by hand delivery to John Craft, Asistant District Attorney, 619 S. White Street, New Orleans, Louisiana 70119, on this 31st day of August, 1983.

Counsel for Petitioner

CERTIFICATE OF MAILING

I hereby certify that this petition for a writ of certiorari was placed in the United States Mail, correctly addressed to the Supreme Court of the United States, on the first day of September, 1983.

Milton P. Masinter
Member, Supreme Court Bar

Sworn to and subscribed before
me on this First day of September,
1983.

NOTARY PUBLIC

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the United States Constitution provides that

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

Amendment XIV of the United States Constitution provides in pertinent part that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, §17 of the Louisiana Constitution of 1974 provides that

> a criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to reach a verdict. * * * The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

La. R.S. 14:30 defined first degree murder as

> the killing of a human being when the offender has a specific intent to kill or to commit great bodily harm.

La. C.Cr.P. art. 786 provides that

> [t]he court, the state and the defendant shall have the right to examine prospective jurors. The scope of the examination shall be within the discretion of the court. A prospective juror, before being examined, shall be sworn to answer truthfully questions asked him relative to his qualifications to serve as a juror in the case.

La. C.Cr.P. art. 798(2) allows the state to challenge a prospective juror for cause when

> (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; . . .

La. C.Cr.P. art. 799 provides in pertinent part that

> [i]n trials of offenses punishable by death or necessarily by imprisonment at hard labor, each defendant shall have twelve peremptory challenges, and the state twelve for each defendant. * * *

La. C.Cr.P. art. 800 provides in pertinent part that

> [t]he erroneous allowance to the state of a challenge for cause does not afford the defendant a ground for complaint, unless the effect of such ruling is the exercise by the state of more peremptory

La. C.Cr.P. art. 905.4(c) provided at the time of the offense that the jury could impose the death penalty upon a finding that

> (c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping.

La. C.Cr.P. art. 905.4(c) was amended effective June 29, 1979, to allow imposition of the death penalty upon a finding that

> (c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity.

Louisiana Supreme Court Rule 28(1) provides that

> Every sentence of death shall be reviewed by this Court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Louisiana Supreme Court Rule 28(4)(b) provides for a sentence review memorandum to be filed by each part, containing

> i. a list of each first degree murder case in the district in which setnece was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

intention. On the *Miller* account, after the two signature names, there was a statement in parenthesis "payable to either or survivor". Here, the notation on the signature card said that the funds were intended for the purchase of property. Although Ms. Miller's written will was technically invalid, it left everything she possessed to her cousin, the donee. The will expressed great gratitude to that cousin. The donee, Ms. Meyer, cared for Ms. Miller until her final hospitalization, whereas Johnson left Ms. Reddick to live with his aunt.

[1] Overlooked by the court of appeal here is the requirement stated in *Succession of Woolfolk*, 225 La. 1, 71 So.2d 861 (1954):

> "... The burden of proving the donation is on the donee and under the decisions of this Court, the proof to support the donation must be *strong* and *convincing*." (emphasis added) 71 So.2d 864.

Here, there is no corroboration of a donative intent, only the self-serving testimony of the donee that Johnson wanted her to have the money. "[T]estimony as to the oral declarations ... of a dead man are of ... little weight, ..." *Succession of Zacharie*, 119 La. 150, 43 So. 988 at 990 (1970). Ms. Reddick admitted that she made purchases for Johnson with the funds in the account. Since Johnson was in and out of the hospital and unable to handle his own financial affairs, the joint account alone does not establish a donative intent. During one of Johnson's hospitalizations, Ms. Reddick withdrew the balance in the bank account and converted it to her own use. After this or a subsequent hospitalization, Johnson did not continue to reside with Ms. Reddick but went to live with his aunt. It is suspicious that most of the funds were transferred while Johnson was in the hospital and Ms. Reddick tried to deny that fact. While she said she had a poor memory, a date when she withdrew almost $47,000 from the bank should have been clear in her mind.

[2] The trial court and court of appeal erred in finding a valid manual donation of decedent's funds on the basis of the flimsy evidence presented here.[2]

DECREE

The judgment of the court of appeal is reversed and it is ordered that plaintiff, Mary Ann Butler, have judgment against defendant, Ruth Daniels Reddick, and her survivors in the sum of $46,971.38.[3]

REVERSED AND RENDERED.

STATE of Louisiana

v.

Antonio JAMES.

No. 82-KA-1230.

Supreme Court of Louisiana.

April 4, 1983.

Concurring in Part and Dissenting in Part May 18, 1983.

Rehearing Denied June 3, 1983.

Defendant was convicted in the Criminal District Court, Parish of Orleans, Bernard J. Bagert, J., of first-degree murder. Death sentence was imposed. Defendant appealed. The Supreme Court, Dennis, J., held that: (1) trial court did not err in excusing prospective jurors who were opposed to death penalty; (2) trial judge did not misuse his discretion in sustaining ob-

2. Strong equitable considerations may justify a judicial exception to the requirement of actual physical delivery. Such exceptions have only been made when the evidence of donative intent was very strong. See the cases cited in *Succession of Miller*: *Succession of Gorman*, 209 La. 1092, 26 So.2d 150 (1946); *Gibson v. Hearn*, 164 La. 65, 113 So. 766 (1927); *Succession of Zacharie*, supra.

3. Ms. Reddick's children, Barbara Warren, Helois Jenkins and William West, were substituted as defendants after Ms. Reddick's death.

jection to particular voir dire question by defense counsel relative to accomplice's testimony; (3) trial court did not err in denying defense opportunity to rehabilitate prospective juror challenged for cause by the State; (4) instruction that specific intent to kill could be inferred from lack of provocation or slight provocation was proper; (5) imposition of death sentence was warranted by aggravating circumstance and was not disproportionate or imposed arbitrarily or out of prejudice.

Affirmed.

Blanche, J., concurred in part, dissented in part, and assigned reasons and would grant a rehearing.

1. Constitutional Law ⇐267
Jury ⇐108

Trial court properly excused prospective jurors, each of whom stated emphatically that he or she could not vote to impose death penalty, even in light of evidence which might be developed in trial or in consideration of law which would govern case; moreover, exclusion was proper under the Fourteenth Amendment, as no juror was excused merely because he had general objection to death penalty or because he could not swear that possibility of death penalty would not affect his deliberations in case, in absence of data to support defendant's claim that exclusion of jurors opposed to capital punishment resulted in jury that was prejudiced against defendant. LSA-C.Cr.P. art. 798; U.S.C.A. Const.Amend. 14.

2. Criminal Law ⇐1152(2)

In general, whether particular question is essential to full voir dire is within sound discretion of trial judge, and his ruling will not be disturbed in absence of clear misuse of discretion. LSA-Const. Art. 1, § 17; LSA-C.Cr.P. art. 786.

3. Jury ⇐131(4)

Because right to full voir dire examination has constitutional basis, wide latitude should be given defendant to test prospective jurors' competency and impartiality. LSA-Const. Art. 1, § 17; LSA-C.Cr.P. art. 786.

4. Jury ⇐131(1)

Purpose of voir dire examination is not to elicit jurors' opinions concerning particular evidence to be offered at trial. LSA-Const. Art. 1, § 17; LSA-C.Cr.P. art. 786.

5. Jury ⇐131(17)

Trial judge did not misuse his discretion in sustaining objection to defense counsel's question on voir dire as to how prospective juror would go about scrutinizing accomplice's testimony, at least where defense counsel was otherwise allowed wide latitude in questioning prospective jurors about accomplice testimony and was able to conduct extensive voir dire so as to intelligently exercise his right to challenge prospective jurors for cause or peremptorily.

6. Criminal Law ⇐1166.17

Erroneous allowance to the State of challenge for cause does not afford defendant ground for complaint, unless effect of such ruling is exercise by the State of more peremptory challenges than it is entitled to by law. LSA-C.Cr.P. arts. 799, 800.

7. Criminal Law ⇐1166.17

Where offense was one punishable by death and State was allowed 12 peremptory challenges, defendant could not complain of allegedly improper grant of the State's challenge for cause, at least where record reflected that the State exercised only 11 of its peremptory challenges. LSA-C.Cr.P. arts. 799, 800.

8. Criminal Law ⇐730(1)

Though prosecutor's remarks that he would play tape recording for jury of description of plea bargain entered into by defendant's accomplice, who testified as State witness, implied that the tape recorded statement contained something harmful to defendant's case, trial court did not commit reversible error in denying mistrial, at least where it was never made clear to jury exactly what harmful details in tape might be; under the circumstances, admonition by trial judge was sufficient to assure defendant fair trial. LSA-C.Cr.P. art. 771.

9. Homicide ⇐286(1)

Trial court did not err in instructing jury that specific intent to kill could be inferred from lack of provocation or slight provocation.

10. Criminal Law ⇐829(1), 830

Trial judge did not err in refusing defendant's requested charges, in view of fact that each instruction requested was either included in trial judge's instructions or was incorrect statement of law which would have required correction or further explanation. LSA-C.Cr.P. art. 807.

11. Criminal Law ⇐1206(2), 1208(1)

In determining whether death sentence is constitutionally excessive, the Supreme Court determines whether sentence was imposed under influence of passion, prejudice, or any other arbitrary factor, whether evidence supports jury's finding of statutory aggravating circumstance, and whether sentence is disproportionate to penalty imposed in similar cases, considering both crime and defendant. U.S.C.A. Const. Amend. 8.

12. Criminal Law ⇐1208(1)

Alleged failure of one of two aggravating circumstances and possible invalidity of evidence supporting that finding did not so taint proceedings as to invalidate other aggravating circumstance, which was supported by evidence, or sentence of death imposed by jury. LSA-C.Cr.P. art. 905.4(a, c).

13. Criminal Law ⇐1206(2)

Comparison of death sentence imposed in first-degree murder prosecution to sentences imposed in other first-degree murder prosecutions showed that it was not disproportionate, in light of defendant's extensive juvenile and criminal record and senseless, brutal fashion in which murder was committed. U.S.C.A. Const.Amend. 8.

14. Criminal Law ⇐1208(1)

Record failed to indicate that death penalty was imposed arbitrarily or without reason or out of local passion; though defendant was black man and victim was white, record was devoid of any evidence suggesting that racial prejudice was factor in imposition of penalty.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Harry F. Connick, Dist. Atty., John Craft, David Batt, Mary Charlotte McMullan, Asst. Dist. Attys., for plaintiff-appellee.

Numa Bertel, Dwight Doskey, New Orleans, Orleans Indigent Defender Program, for defendant-appellant.

DENNIS, Justice.

The state's evidence indicates that on January 1, 1979, the defendant, Antonio James, approached seventy year old Henry Silver as Mr. Silver was getting out of his car in his neighborhood in New Orleans. The defendant placed a gun to Mr. Silver's head and demanded his money. When Mr. Silver shouted for help, defendant James placed the gun under Silver's right ear, cocked the hammer, and fired a shot into Mr. Silver's head. Defendant then rifled through Silver's pockets and removed his wallet containing thirty-five dollars. He drove away in a nearby waiting car. Mr. Silver died a few hours later at Charity Hospital.

The defendant was arrested on January 26, 1979 when he bungled another armed robbery attempt and was shot with his own gun. He was indicted for first degree murder. In December, 1981, a jury found him guilty as charged. After deliberation, the same jury unanimously recommended that the defendant be sentenced to death.

On appeal, the defendant filed nine assignments of error. Because we find no merit in these assignments, we affirm the defendant's conviction and sentence of death.

ASSIGNMENT OF ERROR NUMBER ONE

[1] By this assignment of error, defendant asserts that the trial court erred in excusing prospective jurors who had reservations about the death penalty but were not unalterably opposed to it.

The record reflects that fourteen prospective jurors of a venire of sixty-nine persons were excused for cause by the court after state challenges on the ground that they would not consider the death penalty under any circumstances during the sentencing phase of the proceedings. One of the excluded jurors expressed opposition to the death penalty only and declared himself capable of otherwise determining the defendant's guilt or innocence.

The defendant now claims that the exclusion of those jurors opposed to the death penalty prejudiced the remainder of the jury and requires a reversal.

Under Louisiana law, in a capital case, the trial court, upon the state's motion, must exclude for cause any juror who

> has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt....

La.C.Cr.P. art. 798.

Nevertheless, under the United States Constitution, not every attitude against the death penalty may serve as grounds for excluding a prospective juror. In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the United States Supreme Court held that the death penalty could not be imposed upon a defendant tried by a jury from which potential jurors who voiced a general objection to the death penalty were excluded. Recently, the High Court extended this reasoning to prohibit the state from excluding prospective jurors from service merely because they were unable to take an oath that the mandatory penalty of death or imprisonment for life would not "affect" their deliberations on any issue of fact. *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

The record reflects that in the instant case each juror excused because of his opposition to the death penalty stated emphatically that he or she could not vote to impose the ultimate penalty, even in light of evidence which might be developed in the trial or in consideration of the law which would govern the case. Therefore, these jurors were properly excluded under Louisiana law. La.C.Cr.P. art. 798. Moreover, these prospective jurors were properly excluded under the Fourteenth Amendment, for no juror was excused merely because he had a general objection to the death penalty or because he could not swear that the possibility of the death penalty would not affect his deliberations in the case. See, *Witherspoon v. Illinois*, *supra*; *Adams v. Texas*, *supra*. Accordingly, the exclusion of the prospective jurors in the present case was proper.

Nevertheless, the defendant seeks a reversal arguing that the "death qualified" jury was in some way prejudiced against him. In *Witherspoon*, the United States Supreme Court refused to grant relief on the basis of this issue, stating that the data adduced by the petitioner were too tentative and fragmentary to justify a conclusion, either on the basis of the record in the case or as a matter of judicial notice, that the exclusion of jurors opposed to the capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. *Witherspoon v. Illinois*, 391 U.S. at 517, 88 S.Ct. at 1774. Similarly, this court has recently declined to hold upon only the defendant's mere contention that such a jury is more likely to vote to convict the defendant. *State v. David*, 425 So.2d 1241 fn. 1 (La. 1983).

The defendant concedes that he has no data to support his claim. Therefore, although the issue remains susceptible to argument based on new data in this court and, presumably, the High Court, we decline to reverse the defendant's conviction or sentence on mere speculation.

Accordingly, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

By this assignment of error, the defendant contends that the trial judge erroneously restricted the scope of voir dire examination on the jurors' assessment of accomplice testimony.

During voir dire, defense counsel attempted to inquire about the jurors' opinions in evaluating accomplice testimony. Specifically, the attorney for the defendant described in detail before the prospective jurors the fact that one of the witnesses would be a person accused of participating in the instant offense. He continued at some length regarding the weight to give an accomplice's testimony. The attorney then asked a prospective juror: "[h]ow would you go about in your mind scrutinizing testimony like that?" The state objected to this question on the grounds that the court's charge would be the legal criteria for evaluating testimony and the inquiry would go into what the jurors thought and into their opinions. The trial judge sustained the objection ruling that the defense counsel had asked the juror to commit himself to whether he would believe the testimony of an alleged accomplice in the case.

[2–4] An accused in Louisiana is guaranteed the right to "full voir dire examination of prospective jurors...." La. Const. 1974, art. I, § 17; Cf. La.C.Cr.P. art. 786. In general, whether a particular question is essential to full voir dire is within the sound discretion of the trial judge. *State v. Parker*, 416 So.2d 545 (La.1982); *State v. Robinson*, 404 So.2d 907 (La.1981); La.C.Cr.P. art. 786. His rulings thereon will not be disturbed in the absence of a clear misuse of discretion. *State v. Parker*, *supra*. However, because the right to full voir dire examination has a constitutional basis, wide latitude should be given the defendant to test prospective jurors' competency and impartiality. Nevertheless, the purpose of voir dire examination is not to elicit jurors' opinions concerning particular evidence to be offered at trial. *State v. Parker*, *supra*; *State v. Robinson*, *supra*; *State v. Murray*, 375 So.2d 80 (La.1979).

[5] Although we do not think that the defense counsel's question called for an opinion by a juror as to actual evidence to be presented at trial, we cannot say the trial court misused its discretion in disallowing the particular query. In the instant case, defense counsel was allowed wide latitude in questioning prospective jurors about accomplice testimony. The record suggests that defendant was able to conduct extensive voir dire so as to intelligently exercise his right to challenge prospective jurors for cause or peremptorily. The prohibited question was very introspective and would have called for a time-consuming examination of his thought process by each prospective juror. The disallowance of this single open-ended question did not prevent a full and effective voir dire in this case. Therefore, the trial judge did not clearly misuse the discretion afforded him by our law.

Accordingly, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

[6, 7] By this assignment of error the defendant argues that the trial court erred in denying the defense the opportunity to rehabilitate a prospective juror challenged for cause by the state.

Under our law, the erroneous allowance to the state of a challenge for cause does not afford the defendant a ground for complaint, unless the effect of such ruling is the exercise by the state of more peremptory challenges than it is entitled to by law. La.C.Cr.P. art. 800. Because the instant offense was one punishable by death, the state was allowed twelve peremptory challenges, La.C.Cr.P. art. 799, and the record reflects that the state exercised only eleven of those challenges. Therefore, the defendant may not complain of the allegedly improper grant of the state's challenge for cause.

Accordingly, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FOUR

[8] By this assignment of error the defendant contends that the trial court erred when it denied a motion for a mistrial made after the prosecutor suggested that the defense was concealing evidence.

During cross-examination of Levon Price, the defendant's alleged accomplice and the state's principal witness, defense counsel attempted, presumably for impeachment purposes, to establish that Price had entered into a plea agreement in exchange for his testimony. Price claimed that he could not recall some of the details of his plea bargain. With further questioning, defense counsel attempted to establish the point in time at which Price had entered into the plea agreement. During this cross-examination, the state's attorney interjected that the plea bargain had been described by Price in a tape recorded statement and offered several times to play it before the jury. Out of the hearing of the jury, the defendant's counsel moved for a mistrial based on the prosecutor's remarks, which the trial court denied.

On appeal, the defendant contends that the comments of the prosecutor were so prejudicial to the defendant as to require a mistrial under article 771 of the Louisiana Code of Criminal Procedure.

Article 771 provides, in pertinent part:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
>
> (1) When the remark or comment is made by the judge, the district attorney, or a court official, and the remark is not within the scope of Article 770;
>
> * * * * * *
>
> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

Under the facts of this case, we conclude that the trial court's denial of a mistrial was not reversible error. The record suggests that the defense counsel was able to impute bias or interest to the witness, Price, and so accomplish his intention of impeachment. Although the prosecutor's remarks certainly implied that Price's tape recorded statement contained something harmful to the defendant's case, it was never made clear exactly what that might be. Under these circumstances, we think an admonition by the trial judge for the jury to disregard the remarks would have been sufficient to remove any prejudice which could have been created against the defendant. In such cases, the trial judge is not required to grant a mistrial on defendant's motion because an admonition is sufficient to assure the defendant a fair trial. La.C.Cr.P. art. 771. See *State v. Baldwin*, 388 So.2d 664, 673–74 (La.1980).

Therefore, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE

[9] By this assignment of error, the defendant argues that the trial court erred in its instruction to the jury that specific intent to kill could be inferred from the lack of provocation or slight provocation.

Specifically, the defendant objects to the following charge given by the trial judge:

> Specific intent may be implied where there are no external signs of it but the mere fact of the killing itself. For instance, where there was no lawful reasons for it and the killing is without provocation or upon so slight a provocation as not to justify it. Further if an assault is made upon a person not with the intent to kill but with the intent of inflicting great bodily harm without provocation or justification and death is caused by the assault, it is murder. Also a specific intent to kill may be inferred if any deliberately cruel act was committed against one person by another. The in-

tent may be inferred from the circumstances.

* * * * * *

On at least two occasions a majority of this court has approved charges relative to specific intent which are virtually identical to the instruction in the instant case. See, *State v. Davis*, 411 So.2d 2 (La.1982); *State v. Matthews*, 407 So.2d 1150 (La.1981).

Therefore, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER SIX

[10] By this assignment of error, the defendant contends that the trial court erred when it refused to give six special jury instructions requested by the defense.

Under our law, the state and the defendant have the right to submit to the court special written charges for the jury. La.C.Cr.P. art. 807. The requested charge shall be given if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. La.C.Cr.P. art. 807. However, the trial court is not required to give the requested special charge if it is included in the general charge or in another special charge to be given. La.C.Cr.P. art. 807.

We have carefully reviewed the instructions requested by the defendant in light of the instructions actually given by the trial judge. Each of the instructions requested by the defendant was either included in the trial judge's instructions or was an incorrect statement of the law which would have required correction or further explanation. Therefore, the trial judge did not err when he refused the requested charges.

CAPITAL SENTENCE REVIEW

[11] Every sentence of death imposed in this state is reviewed by this court to determine if it is constitutionally excessive. In making this examination, the court determines whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factors, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

A. *Aggravating Circumstances*

[12] The jury found the existence of two aggravating circumstances: (1) the defendant was engaged in the perpetration of an armed robbery at the time of the murder. La.C.Cr.P. art. 905.4(a); and (2) the defendant had been previously convicted of an unrelated murder and had a significant prior history of criminal activity. La.C.Cr.P. art. 905.4(c).

The evidence clearly supports the jury's finding of the armed robbery aggravating factor beyond a reasonable doubt, and defendant does not contest this determination. However, defendant argues, in assignments of error numbers seven and eight, that the jury's finding of the second aggravating circumstance was tainted because the trial court erred in charging the jury that a death penalty could be returned if it found that the defendant had a "prior significant history of criminal activity" and in allowing the prosecution to base this aggravating circumstance on an armed robbery and a murder which occurred subsequent to the crime for which the defendant was standing trial.

This court has taken the position that where more than one statutory aggravating circumstance is found by the jury, the failure of one aggravating circumstance does not invalidate any other aggravating circumstance found and the sentence of death based thereon. *State v. Sonnier*, 402 So.2d 650 (La.1981); *State v. Monroe*, 397 So.2d 1258 (La.1981); But see, Note, Capital Sentencing Review Under Supreme Court Rule 28, 42 La.L.Rev. 1100, 1112 (1982). In the present case, the jury's finding that the homicide occurred during an armed robbery is fully supported by the evidence, and neither the defendant nor this court is able to find any error in the proceedings related to this determination. Consequently, under our previous decisions, it is not necessary that we consider the merit of defendant's

argument on the assignments of error related to the jury's findings of other aggravating circumstances.

Anticipating this conclusion, defendant contends that our action constitutes an abandonment of the appellate review function essential to a constitutional death penalty scheme, see *Gregg v. Georgia* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and calls our attention to *Zant v. Stephens*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), in which a similar issue was presented and the High Court certified a question to the Georgia Supreme Court to determine the premises of state law which support the conclusion that the death sentence in that case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury.

Since defendant's brief was filed, the Georgia Supreme Court has answered the question by describing the Georgia sentencing scheme metaphorically as a pyramid in which only certain, narrowly defined, homicides requiring aggravating circumstances are crimes for which the defendant is a potential subject of the death penalty. The high court of Georgia concluded that the purpose of the statutory aggravating circumstances is to limit to a large degree the factfinder's discretion. In the situation where the factfinder finds more than one aggravating circumstance present, the failure of one of the circumstances does not serve to remove the case from those for which the perpetrator is "death eligible." Although the failure of an aggravating circumstance may at times inject an arbitrary factor into the proceedings and invalidate the death penalty imposed, the Georgia court declared that in the case before it, the failure of the one aggravating circumstance had an inconsequential impact on the jury's decision regarding the death penalty. *Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1 (Ga. 1982). The United States Supreme Court has not yet rendered a further decision in the case.

A majority of this court fully considered and rejected an argument similar to defendant's based on *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), in upholding a capital sentence in *State v. Monroe*, 397 So.2d 1258 (La.1981). See also, *State v. Sonnier*, 402 So.2d 650 (La.1981). At the present time, nothing has occurred which persuades a majority that our previous holdings were erroneous.

By a related assignment of error, number nine, the defendant contends that the trial court erred when it allowed the state to introduce at the sentencing hearing defendant's "Angola packet" showing defendant's previous conviction for attempted armed robbery, without requiring the state to show that the plea of guilty was made after the defendant was properly *Boykinized* on that charge. The "Angola packet," was introduced to show defendant's conviction of attempted armed robbery in 1973, presumably to substantiate the state's claim that the defendant has a "significant prior history of criminal activity." La.C.Cr.P. art. 905.4(c). Accordingly, since this alleged error also pertained to the second aggravating circumstance, and it is undisputed that the jury's finding of the first aggravating circumstance was error free, we pretermit consideration of defendant's argument on this assignment of error for the same reason we found it unnecessary to discuss the merits of assignments seven and eight.

Accordingly, the alleged failure of one aggravating circumstance in the present case and the possible invalidity of the evidence supporting that finding does not so taint the proceedings as to invalidate the other aggravating circumstance clearly supported by the evidence or the sentence of death imposed by the jury.

B. Proportionality of Sentence

[13] Defendant, a black male, was twenty-eight years old at the time of the instant murder. He is thought to have a normal IQ but is functionally illiterate. He completed the fifth grade. He apparently has no skills and no significant work history.

Defendant James has amassed a very extensive juvenile and criminal record. The post-sentence investigation report lists thirty-seven juvenile incidents. Defendant was ordered confined to the Louisiana Training

Institute at age fourteen. In 1973, he was convicted of attempted armed robbery and sentenced to serve three years at the state penitentiary. During this period of confinement, defendant was convicted of attempted simple escape. He was released in 1975. In 1978, he was charged with aggravated rape, but the charge was later refused. Defendant was convicted of the January 23, 1979 first degree murder of Alvin Adams and was sentenced to life imprisonment. He was convicted of the January 26, 1979 armed robbery of Robert Hooten and was sentenced to ninety-nine years for this offense. Both of these recent convictions have been affirmed by this court. *State v. James*, 395 So.2d 1368 (La.1981); *State v. James*, 422 So.2d 1164 (1982).

Defendant James is the father of one child, age five, who now resides with and is totally supported by his mother.

The victim of the instant homicide was a seventy year old man.

Of all first degree murder prosecutions in Orleans Parish since 1976, nine have resulted in the death penalty. No sentence has been vacated because it was found to be disproportionate. *State v. Jordan*, 420 So.2d 420 (La.1982).

A comparison of the sentence in this case to sentences in other first degree murder prosecutions shows that it is not a disproportionate sentence. The instant offense was committed without provocation and in a particularly brutal manner, in that the defendant placed a gun beneath the ear of his 70 year old victim and pulled the trigger. Defendant has a history of criminal activity, even if we do not count those crimes committed subsequent to the instant offense. Defendant James has been in and out of correctional facilities since he was fourteen. The defendant did not urge any statutory mitigating factors to persuade the jury to recommend life imprisonment.

There are some cases from Orleans Parish in which the death penalty was not imposed for crimes similar to the one under consideration. However, in those cases the defendants' criminal record was not as extensive as James' or they did not commit their crimes in such a senseless, brutal fashion as the instant murder was committed.

C. Passion, Prejudice or Arbitrariness

[14] Although the defendant is a black man and the victim was white, the record is devoid of any evidence suggesting that racial prejudice was a factor in the imposition of the death penalty. Our review of the record does not indicate that the death penalty was imposed arbitrarily or without reason or out of local passion.

DECREE

For these reasons the defendant's conviction and sentence of death are affirmed.

AFFIRMED.

LEMMON, J., concurs.

BLANCHE, J., concurs in the affirmance of the conviction and dissents from the affirmance of the sentence for reasons to be assigned.

BLANCHE, Justice (concurring in part and dissenting in part).

I concur in the majority's affirmance of the defendant's conviction, but I respectfully dissent from its refusal to set aside the death penalty and order a new capital sentence hearing.

The jury found two aggravating circumstances: (1) the defendant was engaged in the perpetration of an armed robbery, La.C.Cr.P. art. 905.4(a); and (2) the defendant was previously convicted of an unrelated murder and has a significant prior history of criminal activity. La.C.Cr.P. art. 905.4(c). While the defendant does not seriously dispute the jury's finding of the aggravating factor of armed robbery, the defendant does contest the constitutional validity of the second aggravating factor: the determination that defendant "has a significant prior history of criminal activity." La.C.Cr.P. art. 905.4(c). Defendant argues that the language of La.C.Cr.P. art. 905.4(c) is void for vagueness as it fails to set forth clear and objective standards necessary to control the jury's discretion in imposing the death penalty.

It is the opinion of this writer that the defendant is correct in his contention that the phrase "significant prior history of criminal activity" is unconstitutionally vague. A criminal statute is unconstitutionally vague if its meaning is not clear to the average person. *State v. Broom*, ——, So.2d —— (La.1983), No. 82-KA-1717; *State v. Stilley*, 416 So.2d 928 (La.1982). To meet due process requirements, the language of a statute must have a generally accepted meaning sufficient to give adequate warning of the conduct proscribed and provide adequate standards to enable judges and juries to fairly administer the law. *State v. Union Tank Car Co.*, —— So.2d —— (La.1983), No. 82-WA-1008; *State v. Broom*, —— So.2d —— (La.1983), No. 82-KA-1717; *State v. Prestridge*, 399 So.2d 564 (La.1981). In connection with the requirement of adequate standards, the U.S. Supreme Court has held that a statute must not admit of such arbitrary and discriminatory application as to allow prosecutors, judges, and juries "to pursue their personal predilections" with regard to what conduct is or is not proscribed. *Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1974). This is particularly true for death penalty statutes where the legislature is under a constitutional mandate to provide clear and objective standards for channeling a jury's discretion so as to prevent the arbitrary and capricious imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 429, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980).

In the present case, the language of La.C.Cr.P. art. 905.4(c) which is challenged as being vague is the phrase "significant prior history of criminal activity." That language is almost identical to a phrase in Georgia's death penalty statute which was declared to be unconstitutionally vague. In the case of *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (Ga.1976), the Georgia Supreme Court was confronted with the constitutionality of Ga.Code Ann. § 27-2534.1(b)(1) which provided for the imposition of the death penalty where a "murder [is] committed by a person who has a substantial history of serious assaultive criminal convictions." In declaring that provision unconstitutionally vague, the Georgia court held that the phrase "substantial history" was "highly subjective" and failed to provide objective standards sufficient to control the jury's discretion in the imposition of the death penalty.

The Louisiana statute is subject to the same criticism. According to its common definition, a "significant history" would be one "having meaning" or "having or likely to have influence or effect: important, weighty." Webster's New Collegiate Dictionary (1977). As in the case of the Georgia statute, the above language fails to provide a jury with adequate guidance to determine what showing will satisfy the return of this aggravating factor. In fact, the phrase admits of as many different standards as there are juries considering the statute.

In addition, the term "prior" employed in La.C.Cr.P. art. 905.4(c) is not defined to indicate the relevant time frame. A "prior history" may refer to a time period before the commission of the crime in question, or to a time period before the sentencing hearing in which the state is urging La.C.Cr.P. art. 905.4(c) as an aggravating circumstance. As illustrated by the facts of the present case in which the state was allowed to present as aggravating circumstances an armed robbery and a murder which occurred subsequent to the crime for which defendant was being tried, the failure to delineate the time frame encompassed by the term "prior history" may have irreparable consequences for an accused.

Finally, the phrase "criminal activity" is also uncertain in its meaning. Does "criminal activity" refer only to criminal convictions, or does it necessarily encompass arrests as well? Does it refer only to felony offenses or does it also include misdemeanors? The term fails to provide a jury with clear guidance as to its application.

It is obvious from this review that La.C.Cr.P. art. 905.4(c) vests juries with a wide

latitude of discretion as to whether or not to impose the death penalty. Under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny, the exercise of such broad discretion by a jury in a capital case is constitutionally impermissible. Accordingly, La.C.Cr.P. art. 905.4(c) must be declared unconstitutional.

The determination that La.C.Cr.P. art. 905.4(c) is unconstitutional raises the following question: Is the death penalty invalid when it is imposed pursuant to an unconstitutional aggravating circumstance even though there are other aggravating circumstances which by themselves would be legally sufficient to permit the jury to impose the death penalty and as to which there is no uncertainty?

A majority of this court, the present writer included, has previously taken the position that where more than one statutory aggravating circumstance is found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate any other aggravating circumstance found and the sentence of death based thereon. *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Sonnier*, 402 So.2d 650 (La.1981). Upon reconsideration of this issue and especially in light of the present factual situation, I am now convinced that the majority position is only correct so long as the failing statutory aggravating circumstance does not introduce an arbitrary factor in the jury's determination.

Under Article I, § 20 of the 1974 Louisiana Constitution and Supreme Court Rule 28, § 1(a), this court is charged with reviewing the jury's recommendation of death to determine if that recommendation was influenced by passion, prejudice, or any other arbitrary factors. Consequently, any error with respect to the jury's finding of an aggravating circumstance, especially an error of constitutional dimensions, must be scrutinized according to whether such finding introduced an element of arbitrariness and capriciousness into the jury's recommendation of death so as to render that sentence constitutionally impermissible.[1]

The principle that such an inquiry is integral to the exercise of this court's role of appellate review was recognized and advanced by a majority of this court in the case of *State v. Sawyer*, 422 So.2d 95 (La. 1982). In *Sawyer*, we expressly held that the introduction of evidence by the state at the sentencing hearing in support of an unproved aggravating circumstance requires consideration of whether such evidence introduced into the penalty proceeding an arbitrary factor which might have misdirected the jury's sentencing discretion. Such a consideration necessarily requires an initial determination by this court of whether the aggravating circumstances found by the jury are supported by the evidence and/or are constitutional. Accordingly, it was error for the majority in this case to summarily dismiss the defendant's challenge to the constitutionality of La.C.Cr.P. art. 905.4(c). Inquiry by this court as to whether all aggravating circumstances found by a jury are supported by the evidence and/or are constitutional is essential to our constitutional and statutory mandate to review a jury's recommendation to determine if the sentence was influenced by passion, prejudice, or any arbitrary factor.

In the present case, we are confronted with a situation in which one of the statutory aggravating circumstances returned by the jury must fail by reason of its unconstitutionality. As a result, we must determine whether, because of that failure, the defendant's death sentence was imposed under the influence of an arbitrary factor. More properly stated, the question becomes: Was the state's introduction of evidence of defendant's "significant prior history of criminal activity" inconsequential to the

1. Justice Dennis has advanced this same argument in dissents in the following cases: *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Williams*, 383 So.2d 369 (La.1980); *State v. Sonnier*, 379 So.2d 1336 (La.1979); *State v. Martin*, 376 So.2d 300 (La.1979). See also, Note, Capital Sentencing Review Under Supreme Court Rule 28, 42 La.L.Rev. 1100 (1982).

jury's recommendation of the death penalty beyond a reasonable doubt?[2]

This same question was addressed by the Georgia Supreme Court in the case of *Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1 (Ga. 1982). In *Zant*, the defendant received the death penalty after the jury found three aggravating circumstances. One of those aggravating circumstances, that the offense was committed by one having a substantial history of serious assaultive behavior, was later declared to be unconstitutionally vague. *Arnold, v. State*, 236 Ga. 534, 224 S.E.2d 386 (Ga.1976). Nevertheless, the Georgia court held that the defendant's death sentence was not impaired by the invalidity of the aggravating circumstance. *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261 (Ga.1976).

The U.S. Supreme Court certified a question to the Georgia Supreme Court in an effort to discover the premises of state law which support the conclusion that the death sentence is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury. In answer to this question, the Georgia Supreme Court ruled that the constitutional invalidity of one aggravating circumstance would not bar imposition of the death penalty because the evidence upon which the jury had found the constitutionally invalid aggravating circumstance (the defendant's criminal record) had a relevance and ground for admissibility independent of the statutory aggravating circumstance upon which the jury had relied, and therefore did not inject into the penalty proceedings an arbitrary factor. The Georgia Supreme Court cautioned, however, that "[a] different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." *Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1, 4 (Ga.1982).

Adhering to the analysis employed in *Zant*,[3] the determination of the validity of the death penalty imposed in the present case will depend in part upon whether under the Louisiana system of capital punishment, evidence of defendant's criminal record has a relevance and ground for admissibility independent of La.C.Cr.P. art. 905.4(C). After careful review of the applicable provisions and principles, this writer is of the opinion that it does not.

Under Louisiana law, evidence of a defendant's bad character, including other crimes evidence, is properly admissible in a sentencing hearing only as it relates to constitutionally valid aggravating or mitigating circumstances, or otherwise according to the applicable rules of evidence. La.C.Cr.P. art. 905.2. In a footnote to the majority opinion in *State v. Sawyer*, 422 So.2d 95 (La.1982), it was suggested that the usual prohibition against the prosecution's initiation of an inquiry into defendant's character is not applicable in the penalty phase of a capital trial because the focus on character is one of the statutory means of channeling the jury's sentencing discretion. Thus, in *Sawyer* we concluded that evidence of a prior conviction of involuntary manslaughter was admissible in the prosecution's case-in-chief, even though the conviction did not qualify as an aggravating circumstance under La.C.Cr.P. art. 905.4(c).

I do not consider the analysis in *Sawyer* to be persuasive or controlling in the present case. *Sawyer* should not be read for the proposition that La.C.Cr.P. art. 905.2, which directs that the sentencing hearing

2. Such a "harmless error" approach in determining whether a sentence based in part on a non-existent aggravating circumstance can be affirmed on appeal has been adopted by Georgia, *Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1 (Ga.1982), and *North Carolina, State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (N.C.1969), and is preferable to the approach utilized by the majority in this opinion.

3. This writer finds the analysis utilized by the Georgia Supreme Court in a case squarely on point with the present one to be highly persuasive, especially since the Louisiana system of capital punishment is modelled in large part on the Georgia system held constitutional in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). See, Note, Capital Sentencing Review under Supreme Ct. Rule 28, 42 La.L.Rev. 1100, 1102 (1982).

focus on the "character and propensities of the offender," permits a wide-open-no-holds barred approach to bad character evidence. La.C.Cr.P. art. 905.2 expressly provides that although the sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender, the hearing "shall be conducted according to the rules of evidence." The prefatory statement in La.C.Cr.P. art. 905.2 that the sentencing hearing shall concentrate on the defendant's character is not equivalent to saying that all character evidence is admissible. That statement is qualified by the provisions which follow it and which serve to provide a basic guideline for the conduct of a sentencing hearing.

As explained in La.C.Cr.P. art. 905.3, Louisiana's capital sentencing scheme requires the jury to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt and to weigh it against any mitigating circumstances before a sentence of death can be returned. Accordingly, La.C.Cr.P. art. 905.2 provides that evidence relative to aggravating or mitigating circumstances shall be both relevant and admissible in the sentencing hearing, regardless of whether the defendant places his character at issue. However, by the express provisions of La.C.Cr.P. 905.2, unless it fits within the category of an aggravating or mitigating circumstance, bad character evidence, including other crimes evidence, should be admissible only "according to the rules of evidence." To interpret the language and intent of this provision otherwise would be to defeat the legislative aim to provide a carefully tailored sentencing procedure for channeling a jury's discretion in recommending the death penalty.

In this case, because the presence of the unconstitutional aggravating circumstance made it possible for the jury to consider a murder and two armed robbery convictions which might not otherwise have been before it, I cannot conclude beyond a reasonable doubt that the jury was not influenced by the presence of this evidence in its imposition of the death penalty.

Accordingly, I am of the opinion that the evidence offered in support of the unconstitutional aggravating circumstance interjected an arbitrary factor into the penalty phase of the defendant's trial which requires this court to set aside the death sentence and order a new sentencing hearing.

APPENDIX C

Supreme Court of the United States

No. A-65

ANTONIO JAMES,

Petitioner,

v.

LOUISIANA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner~~(s)~~,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 1, 19 83.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 4th day of Auguar, 19 83.

APPENDIX D

No. 271-107 Vio. R.S. 14:30
State of Louisiana
vs.
Antonio G. James

July 14, 1983

Court ordered filed Warrant fixing date of execution at September 15, 1983. Certified copy mailed, return receipt requested, to the Honorable David C. Treen, Governor of the State of Louisiana.

CASE PROCESS

SET FOR CLOSE

DATE TIME

NOTIFY DEFT

JAIL BOND

ATTY NOTE

STATE DAP

DOCKETED 6/1/83

MOTION ☐

CRIM CHRG ☐

CALENDAR ☐

Clerk's Office 8/8 1983

A True Copy

Deputy Clerk

Criminal District Court
Parish of Orleans

Minute Entry

APPENDIX E

SUPREME COURT OF LOUISIANA

NO. 82-KA-1230

STATE OF LOUISIANA

VERSUS

ANTONIO JAMES

APPLICATION FOR A STAY OF EXECUTION
PENDING GRANT OR DENIAL OF CERTIORARI

Now into Court comes the defendant, through his undersigned counsel, to apply for a stay of execution pending the grant or denial of certiorari (and the grant or denial of rehearing before the United States Supreme Court should certiorari at first be denied). In support of this application, defense counsel avers that on August 3, 1983, he timely applied to the United States Supreme Court for a writ of certiorari. However, without notice to defense counsel, on July 14, 1983, the trial court sentenced the defendant to die on September 15, 1983. There is thus the prospect that unless this Court grants a stay of execution, the defendant will die even before he has concluded direct review of his conviction and sentence.

Respectfully submitted,

Dwight Doskey
Counsel for Defendant
Orleans Indigent Defender Prog
2700 Tulane Avenue, Room 112
New Orleans, La. 70119
Tel.: 821-8101

ORDER

Considering the foregoing motion, it is hereby ordered that the execution of the defendant be stayed pending further orders of this Court to issue following the grant or denial of certiorari.

New Orleans, Louisiana, this _____ day of August, 1983.

APPENDIX F

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS

NO. 82-KA-1230

ANTONIO JAMES

- - - - -

In Re: Antonio James, applying for Stay of Execution, Criminal District Court, Parish of Orleans, No. 271-107.

- - - - -

August 9, 1983

Denied.

/s/ JAD

/s/ PFC

/s/ WFM

/s/ HTL

Supreme Court of Louisiana
August 9, 1983

Deputy Clerk of Court
For the Court

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Supreme Court, U.S.
FILED
AUG 29 1983
ALEXANDER L. STEVAS
CLERK

NO. 83-536

ANTONIO JAMES,

Petitioner

Versus

STATE OF LOUISIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

WILLIAM J. GUSTE,
ATTORNEY GENERAL OF LOUISIANA

HARRY F. CONNICK,
DISTRICT ATTORNEY
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WILLIAM R. CAMPBELL, JR.,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

ANTONIO JAMES,

Petitioner

Versus

STATE OF LOUISIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

STATEMENT OF THE CASE

The State's evidence produced at trial shows that on January 1, 1979, Antonio James approached seventy year old Henry Silver, placed a gun to Silver's head and demanded his money. When Mr. Silver shouted for help Antonio James shot him in the head below the right ear. James then rifled through Silver's pockets and removed a wallet containing $35.00. Mr. Silver died a few hours later after being taken to a local hospital.

Antonio James was arrested on January 26, 1979, after having attempted another armed robbery during which he was shot with his own gun. In December of 1981, a jury found him guilty of first degree murder and subsequently unanimously recommended that James be sentenced to death. On April 4, 1983, the Louisiana Supreme Court affirmed the sentence and conviction

of Antonio James. In its statutorily mandated review of this capital case the Louisiana Supreme Court found that the sentence was proportionate, not constitutionally excessive, nor influenced by passion, prejudice or any other arbitrary factors. State of Louisiana v. Antonio James, 431 So.2d 399 (1983).

ARGUMENT

Issue Number 1

Whether a sentence of death is unconstitutionally arbitrary when the record does not support each of the aggravating circumstances found by the jury.

The Louisiana Code of Criminal Procedure States:

> "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances." (Art. 905.3).

In the instant case the jury found the existence of two aggravating circumstances: 1) the defendant was engaged in the perpetration of an armed robbery at the time of the murder. La.C.Cr.P.art. 905.4(a); and 2) the defendant had been previously convicted of an unrelated murder and had a significant prior history of criminal activity. La.C.Cr.P.art. 905.4(c).

Petitioner does not contest the valid determination of the first aggravating circumstance, i.e., that the murder

was committed during the perpetration of an armed robbery, but rather he attacks the second aggravating circumstance on the grounds that the wording of the statute is unconstitutionally vague and that the specified aggravating circumstance is based in part upon an armed robbery and murder which occurred subsequent to the crime for which the petitioner was standing trial.

The Louisiana Supreme Court has taken the position that where more than one statutory aggravating circumstance is found by the jury, the failure of one aggravating circumstance does not invalidate any other aggravating circumstance found, nor would it invalidate the death sentence. State v. Sonnier, 402 So.2d 650 (La.1981); State v.Monroe, 397 So.2d 1258 (La.1981).

Because the Louisiana Supreme Court found the first aggravating circumstance to be fully supported by the evidence and unchallenged by the defendant, it did not find it necessary to consider the merit of petitioner's challenge to the validity or constitutionality of the second circumstance. Nevertheless, the Court referred to its decision in State v. Monroe, supra, in which it rejected the Fifth Circuit holding in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), and held that where two of the three aggravating circumstances found by the jury were upheld on appeal, the death penalty need not be reversed.

In Stephens, the defendant was convicted of murder and sentenced to death. After his conviction and sentence were affirmed on appeal to the Supreme Court of Georgia, he sought federal habeas corpus relief. The United States District Court for the Middle District of Georgia denied him relief, prompting his appeal to the United States Court of Appeals for the Fifth Circuit.

Among the aggravating circumstances found by the jury in returning the death penalty was "the offense was committed by one having a substantial history of serious assaultive criminal convictions." Subsequent to petitioner's conviction, that aggravating circumstance was ruled to be unconstitutionally vague. Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976).

Relying upon a series of cases commencing with Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 85 L.Ed. 1117 (1931), the Fifth Circuit held that because it was impossible to determine whether or not the jury relied upon the unconstitutional aggravating circumstance in returning the death penalty, the penalty could not stand. In Stromberg, a young woman was convicted under a statute, parts of which were patently offensive under the First Amendment. Although one of the alternative theories of guilt under that statute was constitutional, this Honorable Court found that because the judge returned a general verdict which did not indicate which theory of guilt he relied upon the conviction could not stand.

Similarly, the Fifth Circuit found that because it could not determine the extent to which the jury relied upon the unconstitutional aggravating circumstance, the penalty could not stand.

The Louisiana Supreme Court, torn between the conflicting opinions of the highest court of the State of Georgia and an intermediate federal court, chose to adopt as persuasive the opinion of the Georgia Supreme Court.

This conflict has been resolved by this Honorable Court in its reversal of the Fifth Circuit in Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733 (1983), wherein it was held that subsequent invalidation of one of several statutory aggravating circumstances does not automatically require the reversal of the death penalty.

In the instant case, the questioned aggravating circumstance, although found by the jury, was not the basis for appellate approval of the sentence. Since Louisiana law requires that only one aggravating circumstance be found in order to justify the imposition of the death penalty, only one circumstance was reviewed. Since the requisite one aggravating circumstance of murder in the course of an armed robbery was clearly present and was unanimously found by the jury, the challenged circumstance is material only in deciding whether the aggravating and mitigating circumstances weighed together indicate that the death penalty should be imposed. As in Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), the jury necessarily focused on what the defendant had done, not on how Louisiana classified his actions. The lack of precise definitions relative to the second circumstance affected none of petitioner's substantial rights.

The aggravating circumstance upon which the Louisiana Supreme Court based its review is not facially unconstitutional, nor did the circumstance unreviewed by the Court serve as the basis for the death sentence. Irregardless of the number of aggravating circumstances returned by the jury, the implication is clear that, in the absence of facial unconstitutionality, one valid circumstance may properly serve as the basis for appel-

late affirmation of the death sentence. Williams v. Maggio, supra.

In the instant case, however, the Louisiana Supreme Court did not reject the second aggravating circumstance or rule on its constitutionality since the existence of the first circumstance was clearly substantiated. Respondent avers that under standards enunciated in Zant v. Stephens, supra, Williams v. Maggio, supra, and the established jurisprudence of the State of Louisiana, it is unnecessary for this Honorable Court to review the correctness of the jury's determination of the existence of the second aggravating circumstance or the constitutionality of the statute upon which the determination was based. State v. Mattheson, 407 So.2d 1150 (1982); La.C.Cr.P. art. 905.4 (c).

Issue Number 2

Whether the Louisiana Supreme Court review of the proportionality of death sentences is deficient in that it does not compare death sentences handed down across the state.

In reviewing the proportionality of the sentence imposed in a capital case the Louisiana Supreme Court requires that the district attorney file a list of all first degree murder cases heard after January 1, 1976 in the district in which the subject sentence was imposed. The list must include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant. La.Sup.Ct. Rule 28 §4; Louisiana Code of Criminal Procedure Article 905.9.

In the Capital Sentence Review conducted in the instant case, the Louisiana Supreme Court reviewed the sentences imposed in eighty-one first degree murder cases tried in Orleans Parish since January 1, 1976.*/ The Court determined that nine cases had resulted in the imposition of the death penalty, and that no sentence had been vacated bacause of disproportionality. State v. Jordan, 420 So.2d 420 (La.1982). The Court compared the instant case with those submitted in the review and determined that the imposition of the death penalty was not disproportionate nor the result of passion, prejudice or arbitrariness. State v. James, 431 So.2d 399, at 407 (La.1983).

Petitioner avers that the Louisiana Supreme Court's review of cases arising in the same judicial district as the subject case rather than a statewide review constitutes a superficial review and violates his procedural due process rights. Respondent maintains that although the U. S. Supreme Court has referred to statewide reviews as commendable, it has never implied that such review is a constitutional requirement. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S.242, 96 S.Ct. 2960, 49 L.Ed.2d 931 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Williams v. Maggio, 69 F.2d 381 (1982). Respondent further maintains that the sentencing review afforded to petitioner provided adequate safeguards against any arbitrary imposition of capital punishment. As the Fifth Circuit pointed out

---

*/ It should be noted that the City of New Orleans is geographically synonymous with Orleans Parish and constitutes the largest urban population area in the State. Orleans Parish is the only political subdivision in Louisiana to have a separate criminal and civil court system.

in Williams v. Maggio, supra:

> "Just as a venire chosen from a cross-section of the community in which the crime is committed is an adequate constitutional safeguard against arbitrary imposition of verdicts and sentences, so a review of the murder convictions imposed within that venire community is sufficient to ensure against arbitrary imposition of the death penalty."

CONCLUSION

For the foregoing reasons respondent avers that the petitioner's claims of error are without merit and therefore prays that certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of this Brief has been sent to:

Dwight Doskey, Esq.
Orleans Indigent Defender Program
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new Orleans, Louisiana 70119

Attorney for Petitioner

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83-5366

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Supreme Court, U.S.
FILED
SEP 21 1983
ALEXANDER L. STEVAS
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NO.

ANTONIO JAMES,
Petitioner

Versus

STATE OF LOUISIANA,
Respondent

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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98

IN THE

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OCTOBER TERM, 1982

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Versus

STATE OF LOUISIANA,
Respondent

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

I S S U E

WAS PETITIONER DENIED HIS RIGHT TO AN IMPARTIAL JURY WHEN THE TRIAL JUDGE DISMISSED A PROSPECTIVE JUROR ON WITHERSPOON GROUNDS?

ARGUMENT

Petitioner alleges that his constitutional rights were violated when the trial judge dismissed a prospective juror for cause during the defense voir dire since the dismissal may have limited the defense's opportunity to rehabilitate the juror. Respondent avers that:

1) The trial judge acted correctly under Louisiana law and under the standard set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 2770, 20 L.Ed.2d 776 (1968), and

2) If an erroneous challenge for cause was allowed, the petitioner was not prejudiced in that the State had used only eleven of its twelve peremptory challenges at the time of the dismissal of the juror.

Witherspoon and its progeny hold that the death penalty should not be imposed upon a defendant tried by a jury from which potential jurors who voiced a general objection to the death penalty were excluded. Witherspoon makes it clear that the exclusion must result from the venireman's unambiguous statements that he would automatically vote against the imposition of capital punishment no matter what the evidence or the applicable law.

The Louisiana statute, unlike the Illinois statute which occasioned the Witherspoon decision, requires more than the expression of mere scruples or qualms on the part of the juror to warrant dismissal for cause:

> Causes for challenge by the state
>
> It is good cause for challenge on the part of the state, but not on the part of the defendant, that:
>
> (1) The juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is invalid or unconstitutional;
>
> (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against

the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or

(3) The juror would not convict upon circumstantial evidence.

Louisiana Code of Criminal Procedure Art. 798

The trial record of the case before this Honorable Court reflects the following exchange during voir dire:

BY MR. JOHNSON [defense counse]:

Mr. Hitts, the statutory fact that you would only consider the death penalty after the jury reached a unanimous verdict of guilty as charged, would that in your mind have any persuasive effect as to your ability to--then and only then at that time would you consider a death penalty, which is a remote possibility?

BY THE PROSPECTIVE JUROR HITTS:

I couldn't accept it at all.

BY MR. JOHNSON:

There's no circumstances under which you would consider it?

BY THE PROSPECTIVE JUROR HITTS:

I couldn't accept the death penalty at all.

BY MR. PADDISON:

Reurge my challenge.

BY THE COURT:

Challenge for cause. You're excused, sir.

BY MR. PADDISON:

Ms. Narcisse, you're shaking your head. You've got the same problem?

BY THE PROSPECTIVE JUROR NARCISSE:

Same problem.

BY MR. PADDISON:

I have to ask you these questions. Bear with me. I'm not trying to pry. Regardless of what the statute says basically because of this feeling you couldn't apply the law?

BY THE PROSPECTIVE JUROR NARCISSE:

No.

BY MR. PADDISON:

Has it been a longstanding personal scruple on your part?

BY THE PROSPECTIVE JUROR NARCISSE:

I just don't believe in it.

BY MR. PADDISON:

And you've had it a long time?

BY PROSPECTIVE JUROR NARCISSE:

Long enough. I just don't believe in it.

BY MR. PADDISON:

All right. Are there any circumstances you could envision, regardless of whether or not it fit the statute, regardless of whether or not our legislature says that you should do it under these circumstances, is there any circumstance you could consider recommeding the death penalty?

BY PROSPECTIVE JUROR HARCISSE:

I just don't believe in it.

BY MR. PADDISON:

Thank you very much, Ms. Narcisse. Challenge for cause.

BY MR. JOHNSON:

Ms. Narcisse, again, if you would only consider the fact that this is a possibility and a remote one at that--

BY MR. PADDISON:

Object to his characterization of anything being remote in this case.

BY MR. JOHNSON:

Your Honor, I've asked that question a number of times before.

BY MR. PADDISON:

Well, I'm objecting.

BY THE COURT:

Finish the question.

BY MR. JOHNSON:

Considering the fact, Ms. Narcisse, that this is one of an alternative number of verdicts and a case where it would only occur after you reached a verdict unanimously with eleven other jurors for a guilty as charged verdict. And then and only then would you consider that particular sentencing verdict as an alternative. Would that in your mind because of the remoteness of that possibility change your ability to consider this--

BY MR. PADDISON:

I reurge my objection.

BY THE COURT:

I'll excuse her for cause.

Prospective juror Narcisse was in agreement with the prior candidate who stated that he could not accept capital punishment at all. Mrs. Narcisse stated that she could not apply the law and repeatedly stated that she did not believe in capital punishment. Her statements were unambiguous and unmistakably clear within the meaning of both Article 798 and the Witherspoon guidelines, to wit: she would not vote to impose the death penalty even in the light of evidence which might be developed in the trial or in consideration of the law governing the case. Her statements reflect more than just a general objection or scruples regarding capital punishment. This juror was therefore properly excused for cause by the trial judge who acted fully within his discretion and in compliance with the demands of fundamental fairness.

Petitioner alleges that it was error for the trial judge to discontinue the defense voir dire which had the effect of limiting his opportunity to rehabilitate the witness. Under the applicable Louisiana statute an erroneous allowance to the State of a challenge for cause does not afford the defendant a ground for complaint unless the effect of such a ruling is the exercise by the State of more peremptory challenges than it is entitled to by law. La.C.Cr.P. Art. 800. Because the instant offense was one punishable by death, the State was allowed twelve peremptory challenges, La.C.Cr.P. Art. 799, and the record reflects that the State exercised only eleven of those challenges. Therefore the defendant may not complain of the allegedly improper grant of the State's challenge for cause. State v. Edwards, 406 So.2d 1331, cert. denied 102 S.Ct. 2011 (1981), State v. Jones, 408 So.2d 1285 (1982), State v. Matthe-son, 407 So2d 1150 (1981).

Moreover, as pointed out in State v. Edwards, supra, where the State has not used all of its peremptory challenges, the defendant must show that the alleged erroneous challenge for cause was in fact erroneously granted in order to have any basis for the complaint. In the instant case, the juror was properly discharged, hence there is no merit to petitioner's claim.

CONCLUSION

For the foregoing reasons, respondent avers that the petitioner's claim of error is without merit and therefore prays that certiorari be denied.

Respectfully submitted,

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CERTIFIATE OF SERVICE

I certify that a copy of this Supplemental Brief In Opposition To Petition for Writ of Certiorari to the Supreme Court of Louisiana has been served upon:

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